A

Norsiah bt Ali v Rasyikin bt Husain (Majlis Peguam Malaysia, intervener)

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-17D–2–01 OF 2018
NORDIN HASSAN J
3 OCTOBER 2018

C *Legal Profession — Disciplinary board — Appeal against decision of disciplinary board — Professional misconduct — Whether sentence passed by disciplinary board proportionate with misconduct committed by applicant — Legal Profession Act 1976 ss 103(1), 103D(2), (4), (5) & 103E(4)*

D This action was filed by the applicant to set aside the decision of the disciplinary board dated 15 December 2017 pursuant to sub-s 103E(4) of the Legal Profession Act 1976 ('the Act'). The disciplinary board had ordered that the applicant to make restitution to the complainant in the sum of RM58,800 pursuant to sub-s 103(1), 103D(2), 103D(4) and 103D(5) of the Act. It was E further ordered that the applicant be struck off the roll of advocates and solicitors of the High Court of Malaya with effect 21 days from the date of the order. Briefly, the applicant was retained by Zainab bt Hamzah to handle the purchase of a property from Mohamad bin Ismail at the purchase price of RM58,000. The said property was a house known as No K-1-042 B, Jalan LP F 7/4, Lestari Perdana, Bandar Putera Permai, 43000, Seri Kembangan ('the property') at the material time, the property was assigned to AmBank (M) Bhd. On 12 April 2011, a sale and purchase agreement in relation to the property was signed by both parties. The full purchase price in the sum of RM58,800 had been paid by the purchaser to the applicant. However, no receipt of G payment was issued by the applicant. Out of this purchase sum, RM4,800 was paid to the vendor. The remaining RM54,000 was to be used to redeem the property from AmBank (M) Bhd. However, the applicant had failed to redeem the property and the reasons given by the applicant were that there were outstanding administrative and maintenance fees owed by the vendor to the H developer and the balance amount of RM54,000 in the applicant's client account was insufficient to redeem the property. As the applicant failed to execute the sale transaction after lapsed of five years, on 9 August 2016, a letter of complaint was sent to the advocate and solicitor disciplinary board against the applicant. As alluded earlier, the disciplinary board had ordered that the I applicant be struck off the roll of advocates and solicitors of the High Court of Malaya. In the present application, the applicant conceded that the applicant had committed professional misconduct but contended that the sentence to be struck off the roll of advocate and solicitors by the disciplinary board was excessive, harsh and disproportionate. It was further argued that there was no

criminal element in the applicant's case but misconduct for failing to pay the balance sum to the assignee bank. The applicant also had remedied the wrong committed by paying more than the full amount of the purchase price of the property. The counsel acting for the intervener submitted that the misconduct committed by the applicant was serious and it involved a breach of trust. As such, the sentence by the disciplinary board was appropriate and should not be disturbed by this court. The issue for determination was whether the sentence was proportionate with the misconduct committed by the applicant.

Held, allowing the applicant's application, setting aside the decision of the disciplinary board and substituting it with a sentence of suspension for a period of four years with effect from 15 December 2017:

(1) The disciplinary board had failed to consider that: (a) the applicant's misconduct was in regard to her failure to pay the balance sum to the assignee bank and there was no criminal element attributed to the applicant; (b) the applicant had repaid more than the full amount of the purchase price; (c) the applicant had admitted that she had committed profesional misconduct and entered into a consent judgment with the purchaser with regard to a civil suit filed by the purchaser; and (d) that the applicant was remorseful and had remedied the wrong committed. The conduct of the applicant for not paying the balance sum to the assignee bank was poles apart from the conduct of the first appellant in the case of *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, Intervener)* [2018] 2 MLJ 265. In the said case, he misappropriated a sum of RM7m belonging to several 'orang asli' and yet the sentence to struck off the rolls of the advocate and solicitor was replaced by the Federal Court with a suspension of five years. Therefore, the court found that the sentence meted out by the disciplinary board in the present case was manifestly harsh (see paras 14–16).

[Bahasa Malaysia summary

Tindakan ini difailkan oleh pemohon untuk mengenetepikan keputusan lembaga tatatertib bertarikh 15 Disember 2017 menurut sub-s 103E(4) Akta Profesion Undang-Undang 1976 ('Akta tersebut'). Lembaga tatatertib telah mengarahkan pemohon untuk mengembalikan kepada pengadu sejumlah RM58,800 menurut sub-s 103(1), 103D(2), 103D(4) and 103D(5) Akta tersebut. Seterusnya, pemohon diarahkan untuk dilucutkan sebagai peguambela dan peguamcara Mahkamah Tinggi di Malaya berkuat kuasa 21 hari daripada tarikh perintah. Secara ringkasnya, pemohon telah dilantik oleh Zainab bt Hamzah untuk menguruskan hal pembelian hartanah daripada Mohamad bin Ismail pada harga pembelian RM58,000. Hartanah tersebut merupakan sebuah rumah No K-1-042 B, Jalan LP 7/4, Lestari Perdana, Bandar Putera Permai, 43000, Seri Kembangan ('hartanah tersebut') pada masa material, hartanah telah dipegang oleh AmBank (M) Bhd. Pada 12 April

2011, satu perjanjian jual beli berkaitan dengan hartanah telah ditandatangani oleh kedua-dua belah pihak. Harga belian penuh berjumlah RM58,800 telah dibayar oleh pembeli kepada pemohon. Walau bagaimanapun, tiada resit dikeluarkan oleh pemohon. Daripada jumlah belian itu, RM4,800 telah dibayar kepada penjual. Baki RM54,000 diguna pakai untuk menebus balik hartanah tersebut daripada AmBank (M) Bhd. Walau bagaimanapun, pemohon telah gagal untuk menebus balik hartanah dan alasan-alasan yang diberikan kepada pemohon adalah terdapatnya yuran pentadbiran dan penyelenggaraan yang belum dibayar oleh penjual kepada pemaju dan baki RM54,000 di dalam akaun anak guam pemohon tidak mecukupi untuk menebus balik hartanah. Memandangkan pemohon gagal melaksanakan transaksi jualan selepas lima tahun telah tamat, pada 9 Ogos 2016, satu surat aduan telah dihantar kepada lembaga tatatertib peguambela dan peguamcara terhadap pemohon. Sepertimana yang dinyatakan sebelum ini, lembaga tatatertib telah mengarahkan agar pemohon dilucutkan sebagai peguambela dan peguamcara Mahkamah Tinggi di Malaya. Di dalam permohonan ini, pemohon bersetuju bahawa beliau telah melakukan salah laku professional tetapi mengatakan bahawa hukuman pelucutan sebagai peguambela dan peguamcara oleh lembaga tatatertib adalah terlalu berlebihan, keras dan tidak seimbang. Turut dihujahkan bahawa tiada elemen jenayah di dalam kes pemohon tetapi salah laku dalam kegagalan untuk membayar jumlah baki kepada bank penerima. Pemohon juga telah memperbetulkan kesilapannya dengan membayar lebih daripada amaun penuh harga jualan hartanah tersebut. Peguamcara yang menjadi pencelah menghujahkan bahawa kesalahan yang dilakukan oleh pemohon adalah serius dan melibatkan pecah amanah. Oleh itu, hukuman oleh lembaga tatatertib adalah wajar dan tidak patut diganggu oleh mahkamah. Isu yang diputuskan adalah sama ada hukuman adalah wajar dengan salah laku yang dilakukan oleh pemohon.

Diputuskan, membenarkan permohonan pemohon, mengenetepikan keputusan lembaga tatatertib dan menggantikan dengan hukuman pengantungan untuk tempoh empat tahun bermula dari 15 Disember 2017:

(1) Lembaga tatatertib telah gagal untuk mempertimbangkan bahawa: (a) kesalahan pemohon adalah berkaitan dengan kegagalan beliau untuk membayar jumlah baki kepada bank peneriman dan tidak terdapat unsur jenayah oleh pemohon; (b) pemohon telah membayar lebih daripada jumlah penuh harga jualan; (c) pemohon telah mengakui bahawa beliau telah melakukan salah laku profesional dan memasuki penghakiman persetujuan dengan pembeli berkenaan dengan saman sivil yang difailkan kepada pembeli; dan (d) bahawa pemohon telah menyesal dan telah memperbetulkan kesilapannya. Tindakan pemohon dalam tidak membayar jumlah baki kepada bank penerima jauh berbeza dengan perbuatan pemohon pertama di dalam kes *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, Intervener)* [2018] 2

MLJ 265. Di dalam kes tersebut, beliau telah salah guna sejumlah RM7 juta milik beberapa orang asli tetapi hukuman perlucutan jawatan sebagai peguamcara dan peguambela digantikan oleh Mahkamah Persekutuan dengan penggantungan selama lima tahun. Oleh itu, mahkamah memutuskan bahawa hukuman yang diberikan oleh lembaga tatatertib adalah bersesuaian (lihat perenggan 14–16).]

Notes

For cases on appeal against decision of disciplinary board, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1543–1547.

Cases referred to

Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener) [2018] 2 MLJ 265, FC (folld)

Iszam Kamal bin Ismail v Prestij Bestari Sdn Bhd (Bar Council Malaysia, intervener) [2018] 5 MLJ 536; [2017] 10 CLJ 417, CA (folld)

Majlis Peguam Malaysia v Hari Krishnan a/l Jeyapalan [2017] 1 MLJ 770; [2017] 4 CLJ 231, CA (folld)

Legislation referred to

Legal Profession Act 1976 ss 94(2), 103(1), 103D(2), (4), (5), 103E(4)

Razlan Hadri (Danny Soong with him) (Gan, Ho & Razlan Hadri) for the applicant.
Rasyikin bt Husain for the respondent.
GK Ganesan (KN Geetha with him) (GK Ganesan) for the intervener.

Nordin Hassan J:

INTRODUCTION

[1] The applicant in this case filed an originating summon to set aside the decision of the Disciplinary Board dated 15 December 2017 pursuant to sub-s 103E(4) of the Legal Profession Act 1976.

[2] The Disciplinary Board had ordered that the applicant to make restitution to the complainant in the sum of RM58,800 pursuant to sub-ss 103(1), 103D(2), 103D(4) and 103D(5) of the Act. It was further ordered that the applicant be struck off the Roll of Advocates and Solicitors of High Court of Malaya with effect 21 days from the date of the order.

THE BRIEF FACTS

[3] The relevant facts based on the affidavits and documents filed in this application as well as submissions made by both parties are the following:

A (a) the applicant was retained by one Zainab bt Hamzah to handle the purchase of a property from Mohamad bin Ismail at the purchase price of RM58,000. The said property is a house known as No K-1-042 B, Jalan LP 7/4, Lestari Perdana, Bandar Putra Permai, 43000 Seri Kembangan ('the property') and at the material time, the property was assigned to
B AmBank (M) Bhd;

(b) on 12 April 2011, a sale and purchase agreement in relation to the property was signed by both parties. The full purchase price in the sum of RM58,800 has been paid by the purchaser to the applicant. However, no
C receipt of payment was issued by the applicant. Out of this purchase sum, RM4,800 was paid to the vendor. The remaining RM54,000 was to be used to redeem the property from AmBank (M) Bhd;

(c) however, the applicant had failed to redeem the property and the reasons given by the applicant are that there were outstanding administrative and
D maintenance fees owed by the vendor to the developer and the balance amount of RM54,000 in the applicant's client account was insufficient to redeem the property;

(d) as the applicant failed to execute the sale transaction after lapsed of five
E years, on 9 August 2016, a letter of complaint was sent to the Advocate and Solicitor Disciplinary Board against the applicant. The complaints against the applicant as summarised by the Disciplinary Committee in its report are as follows:

F (i) the respondent did not pay the balance sum of RM58,800 of the sale and purchase of the property to the vendor inspite of the full sum being paid to the respondent;

(ii) no receipts whatsoever were issued; and

(iii) the respondent was slow and uncooperative and gave various
G reasons for the delay;

(e) having heard the evidence by relevant parties, the Disciplinary Committee finds that the applicant has committed professional misconduct against the complaint which, inter alia, the following:

H (i) the balance sum of the sale and purchase price of RM54,000 has not been utilised to pay the redemption sum outstanding and is also not in the respondent's clients' account contrary to the claim made by the respondent;

I (ii) not paying the balance sum to the assignee bank although the redemption statement were obtained twice; in 9 April 2012 (R6) and 2 March 2015 (R7).

(iii) receipts were not given immediately to the complainant bolstering the complaint's claim, notwithstanding respondent claims of the

receipts being kept by the account department.
The respondent furnished the said receipts (R11 and R12) after a lapse of a week from the dateline given to furnish them to the Committee; and

(iv) the complainant provides no record of excuses given by respondent except both agreed that they met in December 2016. In fact there were no correspondences between the parties;

(f) in the circumstances, the Disciplinary Committee, pursuant to sub-s 103(1) of the Act made the following recommendation to the Disciplinary Board:

(i) there is therefore cause for disciplinary action to be taken against the solicitor, Cik Norsiah bt Ali of M/S Zamri Anuar & Norsiah and the firm as there is not only procedural delay in handling the matter but breach of trust as well;

(ii) the breach of trust is extremely serious and the committee recommends that the respondent be suspended for a period and the firm be a held accountable too;

(iii) the respondent must make restitution of the sum of money paid to her firm;

(iv) the respondent must ensure that the property is properly transferred to the purchaser without delay; and

(v) the respondent must be liable for all claims made by the vendor;

(g) thereafter, on 15 December 2017 the Disciplinary Board made its decision as mentioned earlier and the grounds of its decision was informed to the applicant by letter dated 26 February 2018 reproduced below:

A

LEMBAGA TATATERTIB PEGUAM - PEGUAM

ADVOCATES & SOLICITORS DISCIPLINARY BOARD

8th & 9th Floor, Wisma Maran, 28 Medan Pasar, 50050 Kuala Lumpur

Phone: (603) 2034 1911
Fax: (603) 2031 2163
e-mail: secretariat@aadb.org.my

Working Hours
Monday – Friday
8.30 a.m. – 5.30 p.m.

B

Your Ref :

Our Ref : DC/16/0634/nah(ground)

Date : 26 FEB 2018

Ok Norsiah Binti Ali
No. 4, Jalan 2/4
Bandar Baru Selayang
68100 Batu Caves
Selangor

(The Respondent)
c/o Post
5/3/18

C

Dear Madam,

Re: Complaint No : DC/16/0634
Complainant : Rasyikin Binti Husain
Respondent : Norsiah Binti Ali

Kuala Lumpur High Court Originating Summons No. WA -17D-2-01/2018
Appellant : Norsiah Binti Ali
Respondent : Rasyikin Binti Husain

HAJJARAL ASWANI, IZWA JURISH & CO
Peguambela & Peguamcara
13-1A Plaza UMNO
Jalan Batu Caves
68100 Batu Caves, Selangor.
Tel / Fax : 03-61811062

D

We refer to your letter dated 03.1.2018, contents of which have been duly noted.

As requested, set out below are the grounds of the Board's decision for your perusal:-

Decision: The Board made reference to the Report submitted by the Disciplinary Committee and noted the following:

E

i) that the balance purchase price of RM54,000.00 has not been utilized to pay the redemption sum outstanding and is also not in the Respondent's Client' Account contrary to the claim made by the Respondent;

ii) that the Respondent has failed to pay the balance sum to the Assignee Bank although the Redemption Statement were obtained twice i.e on 09.4.2012 and 02.3.2015;

iii) that the Respondent's failure in providing receipts immediately to the Complainant has bolstered the Complainant's claim, notwithstanding Respondent claims of the receipts being kept by the Accounts Department.

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The Board was therefore in agreement with the Disciplinary Committee's finding that that Respondent had committed breach of trust but partly disagreed with its recommendation on punishment.

The Board was also of the view that a serious misconduct has been committed by the Respondent and ordered the Respondent be Struck off Roll of an Advocate and Solicitor of the High Court of Malaya and to make restitution in the Sum of RM58,800.00 to the Complainant.

Thank you.

Yours faithfully,

G

Director
Complaints Secretariat

WITHOUT PREJUDICE

RECEIVED
05 MAR 2018
M. S. HAJJARAL ASWANI & ASSOCIATES

(Counsel for the Complainant)
By Fax 03-61811062/Post

C. C. Messrs Hajjaral Aswani, Izwa Jurish & Co
Advocates & Solicitors
13-1A Plaza UMNO
Jalan Batu Caves
68100 Batu Caves, Selangor
(Your Ref:Haj/IJL-norsiah/2018/bc)

H

I

The purchaser of the property had also filed a civil suit at Shah Alam sessions court against the applicant's firm in March 2017 but on 12 April 2017 both parties entered a consent judgment on the following terms:

(i) a declaration that the applicant and the applicant's firm was professionally negligent in their failure to complete the sales and purchase of the property;

(ii) that the applicant is to pay any late payment penalty to the vendor;

(iii) that the applicant will have to pay exemplary damages (to be assessed by the court) for the negligence; and

(iv) that the applicant will pay the purchaser RM5,000 as costs for the civil action;

(h) in relation to the consent judgment, on 1 August 2017, the applicant had paid RM50,300 to the purchaser's new solicitor, Messrs Saleh & Aizac. This amount is the balance of the purchase price paid to the applicant after the earlier payment made to the vendor in the sum of RM4,800 and RM3,700 to AmBank (M) Bhd; and

(i) on top of the total amount of RM58,800 paid by the applicant, the applicant also made the following payments:

(i) RM2,000 to AmBank (M) Bhd for the outstanding sum of the loan;

(ii) RM8,032.90 to the purchaser's new solicitor to make full payment for the redemption of the property; and

(iii) RM5,000 as costs to the purchaser in the civil suit filed at Shah Alam Sessions Court.

THE APPLICANT'S SUBMISSION

[4] Counsel of the applicant in his oral submission before this court conceded that the applicant has committed professional misconduct but contends that the sentence to structk off the Roll of Advocates and Solicitors by the Disciplinary Board is excessive, harsh and disproportionate.

[5] It was further argued that there is not criminal element in the applicant's case but misconduct for failing to pay the balance sum to the assignee bank. The applicant also had remedied the wrong committed by paying more than the full amount of the purchase price of the property.

THE SUBMISSION BY THE BAR COUNCIL (THE INTERVENER)

[6] Counsel acting for the intervener on the other hand, inter alia, submits that the misconduct committed by the applicant is serious and it involved a breach of trust. As such, the sentence by the Disciplinary Board is appropriate and should not be disturbed by this court.

DECISION OF THIS COURT

[7] At the outset, the sentence imposed by the Disciplinary Board against the applicant is within the power given under sub-s 94(2) of the LPA 1976 which provides:

> (2) Any advocate and solicitor who has been guilty of any misconduct shall be liable to one or more of the following penalties or punishment:
>
> (a) *to be struck off the Roll;*
>
> (b) to be suspended from practice for any period not exceeding five years;
>
> (c) to be ordered to pay a fine out exceeding fifty thousand ringgit; or
>
> (d) to be reprimanded or censured.

[8] The only issue here is whether the sentence is proportionate with the misconduct committed by the applicant and on the facts of this case.

[9] The matters to be considered by the Disciplinary Board before imposing sentence has been explained by the Court of Appeal in the case of *Majlis Peguam Malaysia v Hari Krishnan a/l Jeyapalan* [2017] 1 MLJ 770; [2017] 4 CLJ 231 in the following words:

> ... We would take the approach that looking at the offence for the purposes of sentencing the respondent, right thinking members of the disciplinary board should consider and deliberate on the mitigatory factors presented before it before it mates out the appropriate punishment. In a situation where punishment ranges from reprimand and/or ensure to striking out from the Rolls, it would be expected of right thinking members of the DB to consider:
>
> (a) the gravity of the offence;
>
> (b) the exculpatory conduct of the respondent;
>
> (c) the conduct of the complaint since lodging the complaint.
>
> before deciding the appropriate punishment meted out ...

[10] The facts in *Hari Krishnan*'s case has some similarity with the present case where the current balance in the client's account did not reflect the sum of money that the applicant hold on behalf of the purchaser. It was held by the

Court of Appeal that the sentence to struck off the Roll of Advocates and Solicitors of the respondent is manifestly harsh and substituted the sentence to a fine of RM11,400.

[11] On this issue of proportionality, it is also instructive to refer to the Court of Appeal case, *Iszam Kamal bin Ismail v Prestij Bestari Sdn Bhd (Bar Council Malaysia, intervener)* [2018] 5 MLJ 536; [2017] 10 CLJ 417 where it states:

> [8] The powers of sentencing empowered to DB is set out in s 94 of the Legal Profession Act 1976 ('the LPA 1976'). That section itself makes it clear that the DB has various options related to sentencing. It all depends on the nature and gravity of the misconduct. The Legislature, in the wisdom, directly or indirectly, incorporated the proportionality principle of sentencing by stating that an advocate and solicitor found guilty of any misconduct can be struck out from the Roll or suspended or ordered to pay a fine or be reprimanded or censored as the case may be. *To put it crudely, the option to 'struck out' from the Roll must be based on grave misconduct which necessarily must relate to dishonesty or conduct for which other form of sentencing may not be appropriate.*

[12] In this case also the Disciplinary Board's decision to struck off the Rolls of Advocate and Solicitor of the respondent was set aside and substituted which suspension for three years and find of RM10,000. The complaint against the appellant in this case amongst others is that the appellant had issued out the sum of RM318,000 from the client's account which was in stakeholding to a third party without authorization from the client.

[13] Next, in a Federal Court case, *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener)* [2018] 2 MLJ 265 the first and second appellant, who were partner in the firm Messrs Khana & Co was found by the Disciplinary Board to commit professional misconduct and was struck of the Roll of Advocates and Solicitors. The complaint against them, inter alia, for misappropriation of a portion of trust money in the sum of RM7m belonging to several 'orang asli' in Johor.

The sentence imposed by the Disciplinary Board was upheld by the High Court and the Court of Appeal. However the Federal Court allowed the appeal by the first appellant and substituted the sentence with suspension for a period of five years.

[14] Guided by the authorities above mentioned, in the present case, I find, the Disciplinary Board has failed to consider the following matters:

(a) the applicant's misconduct was in regard to her failure to pay the balance sum to the assignee bank and there is no criminal element attributed to

A the applicant. As mentioned in *Iszam*'s case at p 547(MLJ); p 429 (CLJ):

> [13] A survey of some of the cases before and after the coming into effect of the LPA 1976 will demonstrate that the courts had often allowed an advocate and solicitor to be struck out from the Roll only when there was criminal element personally attributed to the advocate and solicitor. Support for the proposition is found in a number of cases.

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(b) the applicant has repaid more than the full amount of the purchase price;

(c) the applicant admitted that she has committed professional misconduct and entered into a consent judgment with the purchaser with regard to a civil suit filed by the purchaser; and

C

(d) the applicant is remorseful and had remedied the wrong committed.

[15] The conduct of the applicant for not paying the balance sum to the assignee bank is poles apart from the conduct of the first appellant in *Dinesh Kamavaji*'s case where he misappropriated a sum of RM7m belonging to several 'orang asli' and yet the sentence to struck off the Rolls of Advocate and Solicitor was replaced by the Federal Court with a suspension of five years.

D

E **[16]** Therefore, I find the sentence meted out by the Disciplinary Board in the present case is manifestly harsh.

CONCLUSION

F **[17]** Based on the aforesaid reasons, the applicant's application is allowed and the Disciplinary Board's decision in striking off the Roll of Advocates and Solicitors of the applicant and the order to make restitution to the complainant in the sum of RM58,900 is set aside.

G **[18]** The sentence by the Disciplinary Board is hereby substituted with a sentence of suspension for a period of four years with effect from 15 December 2017.

Order accordingly.

H

Reported by Addibah Adnan

I